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No. 92-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,
v.
ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae. The written consents of all parties have been filed with the Clerk of this Court. The brief urges reversal of the decision below and thus supports the position of the petitioner.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. The Council's govern-

ing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

As employers, all of EEAC's members, and the constituents of its trade association members, are subject to claims for punitive damages under a variety of federal and state laws and common law causes of action, including 42 U.S.C. § 1981, many state fair employment practices laws, and most state law tort actions arising out of the employment relationship. EEAC's members also are potential targets for jury trials for compensatory and punitive damages under the Civil Rights Act of 1991 (P.L. 102-166 (1991)), which added these damages to Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. Although the '91 Act capped these damages for large employers presently at $300,000 for each claimant, Congress is likely to consider legislation this year to lift this cap altogther.

Thus, the issues in this case are extremely important to the nationwide constituency which EEAC represents. In its decision below, the Supreme Court of Appeals of West Virginia decided that the amount of punitive damages awarded by a jury could turn on whether the defendant had been "really mean" or just "really stupid." Finding that the petitioner had been "really mean," the court approved a $10 million punitive damages award that was 526 times greater than the $19,000 award for compensatory damages. We agree with Chief Justice McHugh's concurring opinion that "[i]n its cavalier attempt to be clever and amusing," the court ignored traditional fundamental standards for assessing punitive

damages and "offered no practical guidance" for analyzing punitive damages cases. (Pet. App. at 53a-54a).[1]

Recent jury awards cry out for new guidance from this Court. For example, and as shown below, in 1992 alone, juries in employment discrimination cases have awarded single plaintiffs $124 million, $20.3 million and $7.1 million. Employers are extremely concerned that individual juries with no experience in employment cases could have a field day awarding large punitive damages awards under the vague "really stupid/really mean" criteria.

EEAC's members also are outraged by the West Virginia Supreme Court of Appeals' preposterous assertion that:

> The threat of litigation is good news to middle management employees who make many of the day-to-day decisions for large corporations. (Litigation causes work which increases middle management job security.)

(Pet. App. at 37a). Far from welcoming litigation, EEAC members and their managers at all levels take their statutory obligations very seriously and attempt to comply with the law rather than litigate. As shown below, EEAC members have instituted preventative programs to counter employment discrimination and harassment. Employees are advised of these programs, and company procedures are in place whereby aggrieved employees can inform higher management authorities or ombudspersons of possible discriminatory conduct. These policies call for prompt and effective remedial action by the employer, including appropriate discipline of the offender.

Because of its concern that this Court establish meaningful standards for punitive damages, EEAC filed an

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[1] "Pet. App." references are to the Appendix to the Petition for Writ of Certiorari.

amicus curiae brief in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). Since its founding in 1976, EEAC, acting on its interest in issues involving damage awards under the nation's labor and employment laws, has participated as *amicus curiae* in over 300 cases, including *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (appropriateness of remedies); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989) (scope of § 1981); *Murphy v. American Motor Sales Corp.*, 570 F.2d 1226 (5th Cir. 1978) (punitive damages under ADEA); *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (tolling of back pay liability under Title VII); *Rawson v. Sears, Roebuck & Co.*, 822 F.2d 908 (10th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988) (size of jury award in state law claim); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466 (11th Cir. 1991) (supporting employer's discharge of supervisor accused of sexual harassment); *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992) (Arguing for vacation of arbitrator's award which violated the public policy condemning sexual harassment).

EEAC seeks to assist the Court in this case by highlighting the impact its decision here may have on the field of employment litigation. Accordingly, this brief brings relevant matter to the attention of this Court that has not already been brought to its attention by the parties. Because of its significant experience, EEAC is uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

This case arose out of a title dispute over mineral rights. TXO Production leased the oil and gas rights to a tract of land in West Virginia from Alliance Resources. TXO's title attorney later found a cloud on Alliance's title. TXO filed a quit claim deed, then filed an

action to quiet title. Alliance counterclaimed for slander of title, arguing that the title cloud was a sham that TXO created to use as leverage and improve its position in their business dealings.

The jury found for Alliance, awarding the plaintiff $19,000 in compensatory damages. The jury also awarded $10 million in punitive damages, a sum that is 526 times the compensatory award.

The West Virginia Supreme Court of Appeals affirmed and articulated a novel standard for reviewing punitive damages awards. If the case only involves "really stupid" defendants, the court said, punitive damages should be in approximately a five-to-one ratio to compensatory damages. But where the defendants are "really mean," however, punitive damages of 500 times the compensatory award could stand. On this basis, the decision of the jury was affirmed.

The court failed to apply standards developed in the U.S. Supreme Court's decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), or its own decision in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 904-09 (W. Va. 1991). Those standards included factors such as the relationship between the harm and the damages; the reprehensibility and duration of the defendant's conduct; any similar past conduct; the profitability of past conduct; the financial position of the defendant; and the existence of other civil or criminal sanctions against the defendant for similar conduct.

In a concurring opinion, Chief Justice McHugh disagreed with the majority's "ridiculous categorization" (Pet. App. at 54a) of defendants as either "really stupid" or "really mean." The Chief Justice stated:

> In its cavalier attempt to be clever and amusing, the majority opinion has carelessly ignored the fundamental factors which have traditionally been used by

courts to characterize the conduct of defendants in assessing punitive damages.

(Pet. App. at 53a).

Indeed, the Chief Justice pointed out that "none of the courts in the punitive damages cases cited by the majority use the terms 'really stupid' or 'really mean' when describing the defendant's actions in their review of the punitive damages awards." (Pet. App. at 53a-54a). Thus, the concurrence concluded that "the majority has offered no practical guidance to attorneys or judges in analyzing punitive damages cases." (Pet. App. at 54a).

SUMMARY OF ARGUMENT

As many Justices of this Court have observed, unrestrained jury discretion to award punitive damages presents a significant issue under the Due Process Clause. Lacking any guidance as to the appropriate monetary range within which to set an award, juries are left to wander blindly amid concepts of punishment and deterrence, groping in the dark for a suitable amount. Such standardless discretion offers a defendant no warning of its potential liability, and no Constitutional safeguards, even though punitive damages are "quasi-criminal" in nature.

Standardless jury discretion to award punitive damages is of substantial concern to employers. Punitive damages are available in employment-related claims under federal and state laws such as 42 U.S.C. § 1981, state fair employment practices statutes, and various state tort laws that have been put to use in employment cases. In addition, pending legislation in Congress would lift the $300,000 cap on compensatory and punitive damages now available under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. Juries have awarded exorbitant sums as punitive damages in employment-related claims. And as shown by the instant case, judi-

cial authority to modify such awards cannot always be relied upon to block such abuses.

Moreover, unrestricted punitive damages awards are antithetical to the remedial and conciliatory goals of federal labor and employment laws. Notwithstanding its recent amendments, a primary goal of Title VII remains the resolution of differences through conciliation rather than litigation. By holding out the hope of a large dollar jury award, the availability of unrestricted punitive damages operates as a serious disincentive to conciliation.

Also of serious concern to employers is the imposition of punitive damages awards against corporate defendants solely on the basis of the doctrine of *respondeat superior*. In the employment law context, use of *respondeat superior* to support a punitive award is particularly inappropriate.

The court below improperly allowed the amount of punitive damages to turn on whether the employer's actions were "really stupid" or "really mean." This standard is hopelessly vague and must be rejected by this Court. Instead, a more meaningful standard must be adopted *and included in jury instructions* in order to place proper limits on punitive damages awards.

First, there must be some reasonable relationship between the amount of punitive damages and actual damages. Next, the jury should be instructed that the depth of the defendant's "pockets" is not a proper consideration. Also, the jury must be instructed to look to the facts in the particular case and not base its decision on personal or societal generalizations about a particular employer or corporations in general.

Further, juries should be instructed that punitive damages should be mitigated if the employer has adopted programs to prevent discrimination or established internal procedures to investigate and punish offenders. Finally, the plaintiff's failure to utilize alternative ave-

nues of relief also should be considered as mitigating punitive damages.

ARGUMENT

I. STANDARDLESS JURY DISCRETION TO AWARD PUNITIVE DAMAGES VIOLATES DUE PROCESS

The issues before the Court in this case are extremely important to private employers facing potential punitive damages awards in employment-related cases. EEAC's members share this Court's "concern about punitive damages that 'run wild.'" *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1043 (1991).

A. This and Other Courts Have Expressed Well-Founded Due Process Concerns Over Unrestrained Jury Discretion to Award Unlimited Punitive Damages

In *Pacific Mutual*, the Court summarized at length the reasons why unlimited jury discretion to award punitive damages may violate the Due Process Clause of the U.S. Constitution:

> This Court and individual Justices thereof on a number of occasions in recent years have expressed doubts about the constitutionality of certain punitive damages awards.

111 S. Ct. at 1038-40. Particularly well-stated was Justice Brennan's complaint in *Browning-Ferris* that:

> Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important and potentially devastating decision.

Id. at 1039 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2923 (1989)). This unpredictability stems in part from the fact that:

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.

Id. at 1040 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

While one could speculate about the motives of individual jurors, this Court should establish clear standards to carry out its earlier directive that governments "have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

This Court also has stressed that:

> [T]he fact finder must be guided by more than the defendant's net worth . . . . [P]laintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Pacific Mutual, 111 S. Ct. at 1045. As was pointed out in the labor relations context, there also is the danger that "punitive damages may be employed to punish unpopular defendants." *IBEW v. Foust*, 442 U.S. 42, 50 n.14 (1979). As the Court stated in *Foust*:

> "[S]ince juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused . . . they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger . . . ."

Id. (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

B. Applying Punitive Damages Standards Should Be More Than an Appellate Exercise. Any Standards This Court Establishes Must Be Contained in the Actual Instructions Given to the Jury

The concerns expressed by this Court about excessive punitive damages have not made their way into the jury rooms where employment discrimination cases are considered. As shown below, in a growing number of instances, jury awards have gotten out of hand, with juries awarding multiple-millions of dollars to individual plaintiffs in single-incident discrimination cases. In these cases, the amount of damages grossly exceeds proven compensatory damages.

We strongly urge, therefore, that whatever standards the Court adopts, the Court should also direct that these standards be incorporated *as part of the jury instructions* in cases with potential punitive damages. The application of these standards should entail more than a legal duelling match between the trial and appellate courts. As Justice O'Connor has pointed out, appellate review is impossible where "juries are not told which factors are permissible and which are not." *Pacific Mutual*, 111 S. Ct. at 1063 (O'Connor, J., dissenting).

II. UNRESTRICTED PUNITIVE DAMAGES AWARDS THREATEN THE NATION'S EMPLOYMENT LAWS

A. The Threat of Unlimited Punitive Damages Exists in Employment-Related Claims Under Federal and State Law

The issue presented here, whether due process is violated by a standardless award of punitive damages, is of substantial importance to employers throughout the United States. Employers can be, and have been, held liable for punitive damages for causes of action arising out of the employment relationship on a number of grounds. 42 U.S.C. § 1981 prohibits racial discrimination in all aspects of employment contracts, and punitive damages are available under that statute. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). Some states have adopted "fair employment practices" laws that substantially parallel the coverage of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Of these, several provide expressly for punitive damages by statute. *See, e.g.*, New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1 *et seq.*, as amended February 8, 1990, A.B. 2872). Others have been interpreted judicially to provide for punitive damages awards. *Grant v. Monsanto Co.*, 51 Fair Empl. Prac. Cas. (BNA) 1593 (S.D. Ohio, 1989) (compensatory and punitive damages available under Ohio Fair Employment Practice Law).

In addition, many states allow employees to pursue common law causes of action in tort arising out of incidents in the workplace. For instance, in addition to Title VII liability, a sexual harassment claim can give rise to tort claims under state law for intentional infliction of emotional distress or even assault and battery, which in turn can lead to an award of punitive damages.[2] Also, the traditional doctrine of employment-at-will has been eroded significantly in recent years through judicially-created exceptions such as "tort claims of wrongful discharge in violation of public policy, contract based claims of wrongful discharge in violation of an employer's policies, and a new tort of abusive or wrongful discharge." I. Shepard, P. Heylman, and R. Duston, *Without Just Cause: An Employer's Practical and Legal Guide on Wrongful Discharge* 17 (1989). Punitive damages often are available under tort theories, and while contract claims do not usually support such a recovery, some states

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[2] *See, e.g., Gilardi v. Schroeder*, 672 F. Supp. 1043 (N.D. Ill. 1986), *aff'd*, 833 F.2d 1226 (7th Cir. 1987) ($12,960.50 in back pay under Title VII and $50,000 in compensatory and $50,000 in punitive damages on state tort claims of battery and intentional infliction of emotional distress awarded to sexual harassment plaintiff).

allow an award of punitive damages on a theory of "tortious or bad faith breach of contract." *Id.* at 212.

Moreover, the Civil Rights Act of 1991 amended Title VII and the Americans with Disabilities Act to allow juries to award compensatory and punitive damages for intentional discrimination. *See* 42 U.S.C. § 1981a. For punitive damages to be recovered, the respondent must have engaged in discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). But these amendments provide absolutely no guidance on how to measure the amount of punitive damages.[3]

Presently, the total of compensatory and punitive damages awardable under the ADA and Title VII to an individual plaintiff is capped at $300,000 for employers with more than 500 employees. 42 U.S.C. § 1981a(b)(3)(D). However, legislation has been introduced in the new Congress that would remove the cap, thus allowing for unlimited damages. See H.R. 224, 103rd Cong., 1st Sess. (1993) ("Rep. Kennelly Renews Push to Uncap Damages Under 1991 Civil Rights Law," Daily Lab. Rep. (BNA), Jan. 6, 1993, at A-1). EEAC's members would be particularly concerned if the "really stupid/really mean" standard could be used under these statutes, particularly the Americans with Disabilities Act, whose substantive standards are completely untested by federal litigation.

Thus, employers are exposed on several fronts to the possibility of unrestricted punitive damages awards of the type at issue in this case. As now shown, recent jury

[3] Likewise, the federal circuits have adopted for Section 1981 cases the standard of "reckless or callous disregard for plaintiff's rights, as well as intentional violations of federal law" set by this Court in *Smith v. Wade*, 461 U.S. 30, 51 (1983). *See, e.g., Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir.), *cert. denied*, 109 S. Ct. 564 (1988); *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1108-09 (6th Cir. 1987). Like the Civil Rights Act of 1991, however, Section 1981 and these cases afford no guidance to a jury on assessing the size of an award.

punitive damages awards have been so outrageously out of proportion to the proven compensatory damages that it is evident that no principled standard has been applied. More likely than not, the jury was motivated more by the size of the employer and the depth of its pockets than any other standard.

B. Punitive Damages Awards in the Employment Context Are "Skyrocketing"

Punitive damage awards, particularly in the business context, are increasing by leaps and bounds. A 1987 RAND study, *Punitive Damages: Empirical Findings*, reported massive increases in the number and size of punitive damage awards in business/contract cases, including employment claims, between 1960 and 1984.[4]

Before this Court's *Pacific Mutual* decision, awards in the employment field were staggering. A jury in Texas last year awarded $31,000,000 (reduced to approximately $21,000,000) to an accountant who claimed that his former employer wrongfully fired him after he refused to sign what he believed were fraudulent tax returns. *Sims v. Kaneb Services, Inc.*, No. 8602474 (Harris County, Texas District Court) (settled during pendency of motion for new trial). A former Xerox employee who claimed that the new job she was offered after her old position was discontinued was not what she had been promised won a jury award of $139,716 in compensatory damages and $8,750,000 punitive damages on a pendent state fraud claim, along with $145,000 back pay on an age discrimination claim. *Layman v. Xerox*, No. CA3-87-1733 (N.D. Tx., Dallas Div. 1990).

If anything, the problem has gotten worse since the *Pacific Mutual* decision was handed down. For example, in May 1992, a Texas state court jury awarded $124

[4] M. Peterson, S. Sarma, M. Shanley, *Punitive Damages: Empirical Findings* at vi (1987). *See also Pacific Mutual*, 111 S. Ct. at 1066 (O'Connor, J., dissenting).

million dollars to a Triton employee who claimed that he was wrongfully terminated.[5] In January of the same year, a jury in New York awarded $7.1 million dollars in compensatory and punitive damages to an American Airlines executive who alleged that she was passed over for promotion to the job of general manager of the airline's LaGuardia Airport office.[6] Texaco appealed a state court jury award of $20.3 million dollars to a former executive in a sex discrimination case in California.[7] Likewise, an Oregon jury awarded $6.2 million dollars to a former executive alleging wrongful termination;[8] $3.9 million dollars was awarded to a former employee of Hughes Aircraft Co. who alleged that he was fired because he was black;[9] a Michigan jury awarded $1 million dollars to a former salesman for General Electric Co. who claimed that his discharge during a reduction-in-force violated oral assurances of job security that he had recieved during his interview;[10] and a California jury awarded almost a million dollars to a former employee who alleged breach of contract and intentional infliction of emotional distress due to a negative reference given to a potential employer.[11]

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[5] *Janacek v. Triton Energy Corp.*, No. 90-07220-M (Texas Dist. Ct. May 22, 1992).

[6] Tamar Lewin, Woman Gets $7 Million in Airline Discrimination Suit, *The New York Times*, January 25, 1992.

[7] *Martin v. Texaco Refining and Marketing Inc.*, No. C614044 (Cal. Super. Ct. July 17, 1992).

[8] *Banaitas v. Mitsubishi Bank Ltd*, No. 89-12-07357 (Ore. Cir. Ct. March 19, 1991).

[9] *Harris v. Hughes Aircraft Co.*, No. 010988 (Cal. Super. Ct. June 4, 1992).

[10] *Pietsch v. General Elec. Co.*, No. 89-906227-CZ (Mich. Cir. Ct. April 2, 1991).

[11] *Holton v. Lockheed Corp.*, No. 642082 (Cal. Super. Ct. January 28, 1991).

Furthermore, studies indicate that plaintiffs who risk seeing litigation through to the end of a jury trial will find that juries are more likely to announce a plaintiff's verdict than a verdict in favor of employers. For example, the Institute for Civil Justice, part of RAND Corporation's domestic research division, found that plaintiffs were victorious 70 percent of the time in employment cases ending in a jury trial.[12] Orrick, Herrington & Sutcliffe recently found almost the same result—in a study of all state and federal California courts, juries found in favor of the plaintiff in 61.48 percent of the cases.[13] These studies demonstrate that jury trials are more receptive to plaintiffs than to employers.

The likelihood that they will win before a jury and the possibility of receiving an exorbitant monetary award strongly encourages plaintiffs and plaintiffs' attorneys to proceed to litigation. With such an enormous pay day looming at the end of litigation, plaintiffs and their attorneys may find little reason to explore alternative avenues of resolution. Fewer and fewer employment cases may settle before trial, thus adding to the burgeoning caseload of the federal dockets.

Moreover, awards like those cited above clearly bear "no . . . relation to the actual harm caused," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), and are "be[ing] employed to punish unpopular defendants." *IBEW v. Foust*, 442 U.S. 42, 50 n.14 (1979). In each of these cases, the only rational explanation for the massive award is that the jury sought to punish a large employer by granting the plaintiff a windfall far in excess of actual damages.

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[12] Dertouzos, James N. and Lynn A. Karoly, *Labor Market Responses to Employer Liability*, Institute for Civil Justice, April 5, 1992. The researchers concentrated their study on California juries.

[13] Orrick, Herrington & Sutcliffe, *Employment Law Verdicts*, Labor and Employment Department, June 24, 1992.

Admittedly, federal courts generally have discretion to set aside an excessive jury verdict and order a new trial, or order remittitur of a portion of the verdict that it finds to be excessive. *See generally* 6A Moore's Federal Practice § 59.08[6] (2d Ed. 1989).[14] Similar procedures are available in the states. *See, e.g.*, Ill. Rev. Stat. Ch. 110, Para. 2-1207 (1988) (granting trial court statutory authority to order remittitur and conditional new trial in case of excessive jury award of punitive damages).

As the instant case exemplifies, however, this authority is not a guarantee, as the reviewing courts also are without adequate standards, and may come up with criteria as vague and outlandish as this case's "really mean/really stupid" test.

C. The Absence of Reasonable Restrictions on Punitive Damages Awards Frustrates the Remedial and Conciliatory Policies Inherent in Federal Labor and Employment Law

Unrestricted punitive damages awards are particularly inappropriate because of the unique nature of employment disputes. Unlike typical tort and contract claims, employment controversies do not take place between strangers. The plaintiff and defendant in an automobile accident case generally never met before they collided. The parties to an ordinary breach of contract claim have no ties other than the contract itself. In contrast, most

[14] *See also Vance v. Southern Bell Tel. and Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989) (upholding lower court's grant of judgment notwithstanding the verdict and in the alternative for a new trial on grounds, *inter alia*, that jury award of $2,500,000 in claim under 42 U.S.C. § 1981 was excessive); *Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303, 1314 (7th Cir. 1985) (granting new trial on issue of punitive damages in employment discrimination action under 42 U.S.C. § 1981 unless plaintiff agrees to remittitur from $150,000 to $20,000); *Rodgers v. Fisher Body Div., G.M.C.*, 739 F.2d 1102, 1109 (6th Cir. 1984), *cert. deined*, 470 U.S. 1054 (1985) (reversing and remanding $500,000 punitive damages award under 42 U.S.C. § 1981 for new trial).

labor and employment disputes involve individuals and companies with ongoing relationships that began before the dissension and are expected to continue after the parties' differences are resolved. *Cf. IBEW v. Foust*, 442 U.S. at 51-52. (". . . the threat of punitive damages could disrupt the responsible decision making essential to peaceful labor relations").

Even though punitive damages were added by the Civil Rights Act of 1991, Title VII retains the provisions which require and encourage conciliation and resolution rather than litigation.

> Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin . . . . *Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.* To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation and persuasion before the aggrieved party was permitted to file a lawsuit.

Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (emphasis added).

The availability of unrestricted punitive damages would seriously hamper these conciliation efforts. Federal judges, who are ideally situated to observe the effects of different remedial schemes on the volume of litigation and the willingness of the parties before them to settle, have found general damages awards to be a serious impediment to conciliation and settlement in employment litigation.[15] As these judges have observed, the hope of

[15] The potential effect on the conciliation process of the availability of an unquantified damages remedy was best expressed by

a "big ticket" damages award at trial is a major disincentive to resolution of cases without litigation.

Even though unlimited punitive damages are not now available under Title VII, the Age Discrimination in Employment Act [16] and other federal labor and employment statutes, plaintiffs frequently add pendent state claims to discrimination complaints under federal law. *Cf. United Mine Workers of America v. Gibbs*, 383 U.S.

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courts that wrestled in the late 1970's and early 1980's with the issue of whether compensatory damages could be recovered under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, which authorizes the award of both "legal" and "equitable" relief. These courts agreed that the hope of such awards would "severely cripple the mediation process." *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036, 1039 n.8 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). *See Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) ("Haggling over an appropriate sum could become a three-sided conflict among the employer, the [EEOC], and the claimant."); *Dean, supra* at 1039 ("The silence of the Act with respect to general damages is entirely consistent with legislative intent to abstain from introducing a volatile ingredient into the tripartite negotiations involving [EEOC], employee and employer which might well be calculated to frustrate rather than to 'effectuate the purposes' of the Act."); *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147 (2d Cir. 1984) ("If an individual alleging discrimination knew he could recover compensatory damages if he refused to settle during the administrative process and commenced a civil suit, he would have little incentive to resolve the dispute during the conciliation process."); *Sant v. Mack Trucks, Inc.*, 424 F. Supp. 621 (N.D. Cal. 1976) ("If large tort recoveries are allowable under the ADEA, it is doubtful that alleged age discriminatees will enter into good faith conference and conciliation when around the corner lies the possibility of large dollar pain and suffering recoveries.").

[16] The Age Discrimination In Employment Act does provide for "liquidated damages" in cases of "willful" violations, but these damages are strictly limited to an amount equal to the "unpaid compensation." 29 U.S.C. § 626(b). Moreover, a "willful" violation occurs only when employer acts with "knowing or reckless disregard for whether or not the challenged conduct violated the Act." *Trans World Airlines v. Thurston*, 469 U.S. 111, 128 (1985).

720 (1966) (doctrine of pendent jurisdiction). These state law claims often afford a punitive damages remedy where federal law does not. The possibility of an unrestricted punitive damages award under state law thus has the same deleterious effect on conciliation efforts as would the availability of such an award under the federal statute itself.

III. STANDARDS SHOULD BE ESTABLISHED TO LIMIT JURY DISCRETION TO AWARD PUNITIVE DAMAGES. THOSE STANDARDS SHOULD INCLUDE MITIGATING FACTORS BASED UPON EMPLOYER ATTEMPTS TO COMPLY WITH APPLICABLE LAW

From the foregoing discussion, it is evident that there is a justifiable concern that juries have not been given proper instructions on awarding punitive damages. And as argued above, these standards should be included *in the jury instructions*. This would help insure not only that juries know "which factors are permissible and which are not" (*Pacific Mutual*, 111 S. Ct. at 1063 (O'Connor, J., dissenting)), but also assist supervising trial and appellate courts in having some basis for meaningful court review.

The *Pacific Mutual* case set forth a number of standards for use in determining punitive damages. *See* 111 S. Ct. at 1045. Justice O'Connor's dissenting opinion in *Pacific Mutual* also contains a number of suggestions worthy of consideration. *See* 111 S. Ct. at 1063-65. Indeed, the West Virginia Supreme Court of Appeals, relying on *Pacific Mutual*, adopted a list of standards in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (1991). Unfortunately, that court failed to apply those standards in any meaningful way and, instead, adopted the totally meaningless "really stupid/really mean" rule. Not only is this test hopelessly vague, but it allows inexperienced juries to apply a comparative standard with no basis in experience to make any meaningful comparison to other

employment cases or contexts. Set forth below are a number of suggested standards for jury instructions in cases involving corporate defendants in employment discrimination cases in which punitive damages are sought.

A. There Must Be A Reasonable Relationship Between Punitive Damages And Actual Damages

Punitive damages should not be awarded in amounts disproportionate to the harm actually suffered. Thus, the jury should be instructed to consider "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct and the harm that actually has occurred." *Pacific Mutual*, 111 S. Ct. at 1032. "If the actual or likely harm is slight, the damages should be relatively small." *Garnes v. Fleming Landfill*, 423 S.E.2d at 904.

B. That the Defendant Has "Deep Pockets" Is Not Sufficient to Justify a Large Punitive Damages Award

Although the "financial position" of the defendant may be considered (*Pacific Mutual*, 111 S. Ct. at 1045), this consideration would be most meaningful in not permitting juries to grant such large awards as to damage the financial position of the defendant employer.[17] We strongly suggest that the jury be instructed that:

> [t]he fact finder must be guided by more than the defendant's net worth. [Plaintiffs] do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Pacific Mutual, 111 S. Ct. at 1045.

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[17] For example, in 1992, Senator John Danforth (R-MO) introduced punitive fines legislation (S. 3357). As part of the relevant factors, the jury would be instructed to consider "the effect of the punitive fine on the economic viability of the defendant," and also "the losses of employment that might occur as a result of the assessment." 138 Cong. Rec. S17041 (daily ed. Oct. 5, 1992).

C. Societal or Personal Views About the Defendant Should Not Be Considered In Punitive Damages Awards

Juries should be instructed that in determining the amount of punitive damages, they should consider only the facts of the particular case in light of the specific factors given in the court's jury instructions. Personal or societal opinions about the popularity of the defendant should not be considered. *IBEW v. Foust*, 442 U.S. at 50 n.14.

D. *Respondeat Superior* is Not an Appropriate Sole Basis for Punitive Damages Awards Against Employers. The Unwarranted Generalizations of the Court Below Concerning "Corporate Bureaucracies" Are Outrageous and Were Improperly Considered In Setting Punitive Damages Standards

In explaining its "really stupid/really mean" standard, the court below made totally unwarranted and completely unsupported accusations against corporate officials. The court invented corporate bureaucracies in which officials foment turmoil and litigation in order "to maximize upward mobility for middle management . . . and to augment the work that the bureaucracy is responsible for doing." Pet. App. at 37a, citing *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986). In its search to find something "really stupid," the court below could begin with its own remarkable declaration that:

> The threat of litigation is good news to the middle management employees who make many of the day-to-day decisions for large corporations. (Litigation causes work which increases middle management job security.)

(Pet. App. at 37a). This shocking, unjustified generalization demonstrates that this Court's concern in *Gertz v. Welch* (418 U.S. at 350) about "selectively" using punitive damages to punish unpopular defendants was

right on the mark. As discussed more fully below, EEAC's member companies have adopted internal policies strongly condemning employment discrimination, and many have internal complaint procedures to root out and prevent improper conduct.

If juries were to apply the same concocted generalizations about corporate defendants used by the court below, employers would be extremely vulnerable to liability for punitive damages based upon the doctrine of *respondeat superior*, even though an employer had no reason to know of the unlawful conduct and certainly would not have condoned it if it had, and even if the employer had taken steps to prevent it. Few claims of intentional discrimination are the result of a vote of the corporate board of directors.

On the contrary, personnel decisions often are made by an employee with supervisory authority, but at a level much below the chief executive officer. Similarly, harassment claims normally originate from the offensive behavior of a supervisor, a co-employee or even a non-employee—the conduct of an individual, not corporate management. Supervisory misconduct should not be the basis for punitive damage awards against an employer when the individual supervisor acts without authorization, where the misconduct is contrary to company policy, where the company had no way of knowing of the misconduct, where the misconduct is not condoned, or where the company acts to discipline the supervisor or provide an avenue of recourse to the victim.

E. Even If Punitive Damages Can Be Awarded in Employment Cases, This Court Should Adopt Standards That Credit Empioyer Efforts To Prevent Discrimination as Mitigating Factors

1. *The Jury Should Be Instructed To Consider Favorably Employer Programs Designed To Prevent Discirmination*

This Court previously has held, in the sexual harrassment context, that employers cannot always be held strictly liable for the actions of supervisors. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). This rule is equally, if not more, relevant to liability for punitive damages. As Chief Justice Rehnquist has observed, punitive damages are rationalized as punishment, as deterrence, and as a "bounty" to encourage litigation. *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting). Where an employer has made substantial efforts to prevent the harm complained of, none of these purposes is served by a punitive damages award against that employer.

Thus, standards are necessary to establish when, if ever, an employer may be liable for punitive damages based upon the doctrine of *respondeat superior*. While such standards are imperative now because employers may be vulnerable to punitive damages under state law, *see* discussion pp. 13-15. *supra*, they will be crucial if legislation is enacted to allow recovery of unlimited punitive damages under Title VII and the Americans with Disabilities Act.[18]

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[18] An example of such mitigating factors can be found in the recent 1991 amendments to the New York City Human Rights Law, Chapter 5, 38-107, 13(d)(1). As mitigating factors for the amount of civil penalties, the Commission can consider whether the employer:

> (1) Established and complied with policies, programs and procedures for the prevention and detection of unlawful discriminatory practices by employees, agents and persons employed as independent contractors, including but not limited to:
>
> > (i) A meaningful and responsive procedure for investigating complaints of discriminatory practices by employees,

The sexual harassment context provides a particularly appropriate model for examination. Sexual harassment in the workplace can occur in two circumstances: "quid pro quo," where the offender is in a position of authority and ties acceptance of sexual advances to advancement or other economic benefits, and "hostile environment," where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting EEOC guidelines on sexual harassment, 29 C.F.R. § 1604.11(a)(3)). The federal courts consistently have held employers strictly liable in cases of "quid pro quo" harassment by supervisory employees. *Id.* at 72.

As noted above, however, this Court has refused to hold employers automatically liable in "hostile environment" cases where the offender is a supervisor, and thus presumably would not do so where such an environment was created by a co-employee. The Court suggested mitigation factors such as: (1) the existence of a specific policy prohibiting sexual harassment; (2) whether the policy is communicated to employees in a manner that encourages them to report harassing behavior; (3) whether and when the employer learned of the misconduct; and (4) if the employer's response was adequate. *Id.* at 72-75.

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agents and persons employed as independent contractors, and for taking appropriate action against those persons who are found to have engaged in such practices;

(ii) A firm policy against such practices which is effectively communicated to employees, agents and persons employed as independent contractors;

(iii) A program to educate employees and agents about unlawful discriminatory practices under local, state and federal law; and

(iv) Procedures for the supervision of employees and agents and for the oversight of persons employed as independent contractors specifically directed at the prevention and detection of such practices . . . .

Accordingly, federal courts since *Vinson* have based their decisions on these factors.[19] Thus, if an employer can demonstrate that it made a substantial effort to prevent the existence of a "hostile environment" it may be insulated from liability.

There may be situations, however, where an employer took reasonable steps to promote and implement an anti-harassment policy but was unsuccessful in preventing harassing behavior in a particular case. For example, a supervisor might ignore company policy and request sexual favors in exchange for a promotion recommendation. A co-employee with full knowledge of the company's policy could refuse to take it seriously and continue to harass another worker. If an employer is held strictly liable for "quid pro quo" harassment or falls short of the necessary proof to avoid "hostile environment" liability, the victim may be entitled to damages from the individual perpetrator under Title VII.

It does not follow, however, that an employer should also be liable for punitive damages under these circumstances. Punitive damages are intended to punish wrongdoers and deter future unlawful conduct. If an employer has devoted substantial effort to implementing an anti-harassment policy but was unable to prevent the disobedience of an errant employee, it would serve no purpose to punish the employer. Thus, in cases where punitive damages are available, the employer's efforts should be considered as negating, or at least mitigating against, such an award. At the very least, the charge to the jury should direct the jury to take the employer's efforts into account.

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[19] *See, e.g., Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987) (employer not liable for "hostile environment" sexual harassment under Title VII when it took immediate action, including investigation and discipline, upon receipt of complaint); *Barrett v. Omaha National Bank*, 726 F.2d 424 (8th Cir. 1984) (same); *Kauffman v. Allied Signal*, 970 F.2d 178 (6th Cir. 1992), *cert. denied*, No. 92-700, Dec. 14, 1992 (same); *Scherer v. Rockwell Int'l*, 975 F.2d 356 (7th Cir. 1992).

For example, evidence that the employer has established a strong policy forbidding sexual harassment, has communicated that policy to supervisors and rank-and-file alike, and has indicated its intent to punish those who disobey, should be relevant to show that the company does not condone harassment. Thus, such evidence should distinguish and separate the company's liability from that of an individual supervisor or employee who in effect has engaged in unauthorized, willful misconduct. Indeed, imposing punitive damages against the employer in this situation would be nothing more than improperly dipping into an innocent "deep pocket."

2. *The Jury Should Be Instructed That A Victim's Failure to Use the Employer's Internal Grievance Procedure Mitigates Against Punitive Damages*

Likewise relevant is evidence that the company's policy encouraged employees to report incidents of discrimination or harassment, including methods to bypass the direct supervisor if that person is also the harasser. An employee's failure to come forward to take advantage of the anti-harassment policy must then negate or mitigate against a punitive damages award. The plaintiff's refusal to make use of an available recourse that could have effectively remedied the situation must be taken into consideration in mitigation of a punitive damages award.

In addition, where the affected employee does not make use of an anti-harassment policy and the employer has no reason to know that harassing behavior s occurring, the employer's lack of knowledge must also be considered a mitigating factor. In this situation, punitive damages are particularly inappropriate. Without actual knowledge or any reason to know that unlawful conduct is occurring, the employer is unable to take steps to protect itself from actions contrary to company policy, even if it has a comprehensive anti-harassment policy. Punitive damages would serve no purpose, since there is no employer conduct to be deplored and deterred.

3. *An Employer's Attempt to Investigate and Remedy Misconduct Should Mitigate Punitive Damages*

Finally, the conduct of an employer who *is* informed of harassing behavior is extremely relevant to mitigation of any punitive damages award. An employer who can show that, upon learning that harassment has occurred, it conducted a thorough and bona fide investigation, reached a rational conclusion and took appropriate action, should be credited for those efforts. Indeed, the EEOC has strongly supported such actions. The agency's Guidelines take the position that employers who take "immediate and appropriate" corrective action are not liable for the acts of co-employees. 29 C.F.R. § 1604.11(d).

It also could be argued that an employer who conducts a complete investigation and reaches a well-supported, reasonable judgment that sexual harassment has not occurred, and thus takes no action against the accused employee, should receive credit for its good faith efforts even if a trier of fact later disagrees with its conclusion.

"Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Thus, as the purpose of punitive damages is to punish a wrongdoer and deter future unlawful conduct, it stands to reason that such awards should be severely limited, if not forbidden, when an employer made a good faith effort to prevent the unlawful conduct but its effort was unavailing. Accordingly, this Court should reject any *per se* rule that would allow a jury unrestricted discretion to award punitive damages solely on the basis of *respondeat superior*. Instead, if the Court finds that such awards are appropriate under any circumstances, it should adopt reasonable standards, including taking into account employer efforts to pre-

vent unlawful behavior by subordinates as mitigating factors.[20]

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the decision of the Supreme Court of Appeals of West Virginia should be reversed.

Respectfully submitted,

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[20] Another favorable approach to controlling punitive damages was suggested by Justice O'Connor in *Pacific Mutual*, 111 S. Ct. at 1064. The trial could be *bifurcated* into liability and punitive damages stages. This approach makes it easier to impress upon the jury that a higher degree of evidence is necessary to support punitive damages awards. *See also* S. 3357, Senator Danforth's punitive fines bill that provided for bifurcated proceedings (138 Cong. Rec. S17041 (daily ed. Oct. 5, 1992)).